No. 137.

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Reply Brief of the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Jan. 9, 1899.

No. 137

The First National Bank of Wellington, Ohio,
PLAINTIFF IN ERROR,

VS.

H. P. Chapman, as Treasurer of Lorain County, Ohio,

In Error to the Supreme Court of the State of Ohio.

W. W. BOYNTON,
PLAINTIFF'S SOLICITOR.

(16,630.)

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,

vs.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio.

REPLY BRIEF OF PLAINTIFF IN ERROR.

We beg the attention of the Court to a few observations in reply to what is said, and upon what is omitted to be said, by counsel for the defendant in error in their brief. Counsel seem to have wholly abandoned the endeavor to sustain the comparisons made by the Supreme Court of Ohio of credits with the value of all other taxable property in the State real and personal to reach its conclusion that no discrimination resulted to moneyed capital invested in National Bank shares, because of the exemption of credits from taxation through deduction of debts; nor do they undertake in the least to impair the strength of the proof we make in our original brief of the fact that money invested in credits in Ohio constitutes the great bulk of the moneyed capital of the State, but they seek to obtain a technical advantage by now claiming that this Court cannot notice or look into the report of the State Auditor in order to ascertain the relative value of National Bank shares as compared with other moneyed capital. This claim seems a little remarkable in view of the fact that this very report was put before the Supreme Court of Ohio by the Attorney General to enable it to ascertain the amount of credits and their relative amount compared with other moneyed capital, and in view of the additional fact that such report was not only examined by the Supreme Court of Ohio, but the facts and figures drawn from it were the foundation of the Court's judgment. To show that there is no doubt about either of these propositions we quote, both from the brief of the Attorney General in the State Court, and from the opinion of the Court as well, to show that its

judgment was largely founded upon facts drawn therefrom. On the first page of the brief of the Attorney General filed in the Supreme Court of Ohio he says:

"The public records in the Auditor of State's office, of which for the purpose of this application (hearing) the Court may take judicial knowledge, show the following state of facts:

Capital stock of National Banks in Ohio	$ 45,178,000.00
Appraised value (including real estate)	36,660,000.00
Value of credits	106,385,000.00
Grand duplicate of all taxable property	1,742,520,000.00
Deducting the value of credits	1,636,135,000.00

or in other words, the value of credits, after deducting debts which is a class of property under the laws of the State of Ohio that allows the taxpayer to offset thereon his indebtedness, is but 6½ per cent of the grand duplicate of the taxable property of the State of Ohio."

"Or, in other words, we claim that inasmuch as 93.5 per cent of all of the actual taxable value of the property of the State of Ohio, which includes real estate, rights of way, franchises, stocks and bonds that can not offset any debts against the same, therefore there is no discrimination against the $45,000,000 of bank stock which is valued by the present taxing officers at from 60 to 65 per cent of its market value, placing it upon the exact footing of all other property, save and except the 6½ per cent of credits."

Here we find that on that hearing the report of the Auditor of State was laid before the Court by the Attorney General with a misquoted table of what it contained, and by it, and the claim founded on it by the Attorney General, the Court was led into the error of supposing that money invested in "real estate, rights of way, franchises, stocks and bonds" was of so large amount compared with credits, that no discrimination against capital invested in National Bank shares resulted from allowing deduction of debts from credits in fixing the value of the latter for taxation. We not only have the above matter taken from the State Auditor's report by the Attorney General and his claim made upon it when the case was argued and considered in and by the Supreme Court, but that the Court considered and founded its judgment largely upon it, is evident from the following extracts from the opinion. At page 26 of the record the Court say,

"That the taxable property of the State is classified as follows:" The Court then divides the property of the State as we have given it in our original brief, into a class from which no deductions can be made, and that from which certain legal *bona fide* debts may be deducted, and then say: * * * * "The former amounting in the whole State as shown by the *official reports* for the year 1893 to over $1,636,000,000; that from which certain legal *bona fide debts* may be deducted, consists of credits alone. * * * and the credits in the State (subjected to taxation in the year 1893) as *shown by the official reports* amounted to only $106,000,000."

At page 27 the Court in speaking of the public property exempt from taxation said, "the same amounts to over $160,000,000 in value as *shown by the official reports*, and then adds "it *thus* appears that credits from which certain debts may be deducted form but a small and comparatively insignificant part of *our taxable property*, and are even less than our non-taxable property."

At page 30 the Court say,

"While the official blanks of assessors require each person to give a statement of the total amount of his credits, and then the total amount of his legal *bona fide* debts and the balance of credits over debts is carried out as the amount to be taxed, the amount of debts so deducted has not been carried into the *official reports*.

The only means the Court had of knowing that official blanks of the assessors required each person to give a statement of the total amount of his legal *bona fide* debts as well as credits, was to refer to the blank itself as there is no Statute of Ohio requiring blanks to contain any such matter.

Again at page 30 the Court say,

"There are about $46,000,000 invested in National Bank shares in this State."

A fact which the Court derived from the State Auditor's Report,—and could not have known without.

At page 31 the Court say,

"To put National Bank shares upon an equality with the most favored class of property would free them from all taxation, as more than one hundred and forty millions in value of public and other property is relieved from all taxation in this State, while the National Bank stock amounts to only forty-six millions."

These facts are only ascertainable from the State Auditor's report employed by the Court to obtain them. In view of the matter above given from the brief of the Attorney General in the State Court, and the use made by the Supreme Court of Ohio of the official report of the State Auditor, to deny its use here, we respecfully submit, would be a travesty on justice. Besides this, we respectfully submit that the State Auditor's report was perfectly competent. Section 2737 of the Revised Statutes of Ohio requires the owner of property to list among other things "moneys on hand or on deposit subject to order, his credits, and the amount of moneys invested in bonds, stocks, joint stock companies, annuities or otherwise," and "the monthly average amount or value for the time be held or controlled the same within the preceding year, of all moneys, credits or other effects within that time invested in, or converted into bonds or other securities of the United States or of this State not taxed, to the extent he may hold or control such bonds or securities on said

day preceding the second Monday of April." Section 1034 requires the Auditor to make out in a book to be prepared for that purpose, a complete list or schedule of all the taxable property in his county and the value thereof as equalized, in the form following: * * * "the value of personal property, moneys, credits, investments in bonds, stock, joint stock companies or otherwise, of each person, company or corporation within each township set down in the column opposite the name of the owners, etc., and the Auditor is required to give a copy of this tax list, called a duplicate, to the County Treasurer.

By Section 2863 the County Auditor is required to make out on or before the first day of October, except in counties having cities of the second grade of the first class, when it shall be on or before the 10th day of November, annually and transmit by mail to the Auditor of State, a complete abstract of the duplicate of his county," and further, "make out and transmit to the Auditor of State an abstract of the number and value of each of the enumerated articles, the value of merchants' and manufacturers' stocks, and the value of all other personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and the value of all other articles of personal property as returned by the Township Assessors or as fixed by the County Board of Equalization; said duplicates shall be made out in such form and the statements shall contain such details as the Auditor of the State shall prescribe."

By Section 162 of the Statutes of Ohio the Auditor of State is required to make his annual report to the Governor as early as the 15th day of December in each year. That section reads as follows:

"He shall annually, as early as the fifteenth day of December, make and deliver to the Governor a report of the receipts and disbursements of the State Treasury for the year ending on the fifteenth day of the previous November, also of the balances of the several funds then in the Treasury, the amount of warrants drawn on each fund, and which remained outstanding, the unexpended balances of all appropriations, a careful estimate of all ordinary receipts and disbursements for the year ending November fifteenth next following,, and a detailed statement of the public funded and unfunded indebtedness of each county, township, city, village, and school district, with the rate of interest payable thereon, the date of maturity and purpose for which the same was created, and all such other matters as are required by law, or he may deem valuable to State finances as he deemed proper for the consideration of the General Assembly."

It appears from the foregoing provisions of the Statute that all articles of personal property, tangible and intangible, are to be listed and the value fixed to be carried upon the duplicate by the County Auditor and a copy of that duplicate certified to the Auditor of State, which returns the Auditor of States carries into his annual report to

the Governor, and has so done in Ohio from the organization of the State; so that the Auditor's report has become a fixed public record to which all the Courts of the State refer to find any statistical matter carried into the same. We therefore claim that the Supreme Court of Ohio was fully justified in looking into that report to obtain the information derived from it, and that it would be a denial of justice to hold that this Court has not the same means of information as that upon which the State Court founded its judgment.

Opposite counsel also insist that the capital of National Banks and the capital of unincorporated State Banks, by the laws of Ohio, are placed upon an exact equality as respects taxation. At page 58 of their brief they insist that share capital of the corporate banks and net capital of unincorporated banks are the same in value. That this position is wholly untenable is clearly shown from the following facts:

First, that private or unincorporated banks constitute a distinct class by themselves was expressly declared by the Court in *State ex rel vs. Jones, Auditor*, 51 O. S. 492. The Court reviewing the various classes of property, with their modes of taxation, say:

> "The cashier of each incorporated bank returns annually to "the County Auditor the resources and liabilities of the bank, to-"gether with the number of shares held by each stockholder, and "the par value of each share. The County Auditor fixes the total "value of the shares according to their true value in money; * " * * * as in the case of incorporated banks, so the "mode of ascertaining the taxable value of the personal property "of unincorporated banks is alike peculiar to those associations as "belonging *to a distinct class for the purposes of taxation.*"

The sections of the Statute defining a private banker, or bank, and prescribing the mode of valuing its capital for taxation are as follows:

Sec. 2758. Every company, association ,or person, not incorporated under any law of this State, or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view of profit, shall be deemed a bank, banker or bankers, within the meaning of this chapter.

Sec. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the Auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First. The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, bonds, including United States Government bonds, or evidences of indebtedness, held as an investment, or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

Eighth. The average amount of United States Government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township."

The constitutional validity of this section was drawn in question in *Treasurer* vs. *Bank*, 47 O. S. 503, but was upheld in its entirety with the exception of the part thereof that permitted the deduction of debts from "cash and cash items," contained in the third sub-division of the section. It was contended in that case that the part of Section 2759 which required that County Auditors in levying taxes yearly upon unincorporated banks and bankers, should deduct the aggregate sum of the fifth, sixth and seventh items of the section, was repugnant to Section three of Article twelve of the Constitution, and was, therefore, void: Ibid 517. But the Court held that "That portion of Section 2759 of the Revised Statutes which directs the Auditor to make the enumerated deductions so far as it includes in the aggregate from which the deductions are to be made, the average amount of "cash and cash items" in possession, is in our view repugnant to the Constitution and void, but is not *otherwise objectionable on* Constitutional grounds."

The State Auditor's report shows that there are private or unincorporated banks in all the eighty-eight counties of the State, except three. It does not, however, show how many such banks there are in each county. Returns, however, received from the various County Auditors throughout the State in answer to a circular letter of inquiry for a statement of the number of private and unincorporated banks in their respective counties show the aggregate number to be 250,—exceeding in number all National Banks, and twice the number of incorporated State Banks, all of which are taxed only on their assets less their debts, or in other words, on their net capital, while incorporated banks are taxed upon the actual value of their shares.

Undoubtedly the indebtedness of a bank is considered in determining the value of the shares, but the question for the Auditor, charged with the duty of assessing the value of the shares at their true value in money, is, in view of the bank's resources and liabilities, the nature and extent of its business, the character of its patrons, the ability with which its affairs are managed, what is the true value in money of the shares. The factor or ingredient of good-will arising from the extent of the banks' business, its clientele, and the ability of its management, materially augmenting the value of the shares, are elements or factors wholly wanting and excluded in fixing the taxable value of the assets of private banks. As respects incorporated banks, this added element of good-will is a very important factor in determining the value of its shares. In many cases the good-will more than doubles the value of the shares. That a tax on the capital of a bank is not the equivalent of a tax on its shares was distinctly held in *Van Allen* vs. *Assessors*, 3 Wall. 573, and reaffirmed in *Bradley* vs. *The People*, 4 Wall. 459, the head note of which latter case is as follows:

"A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed, and where the State imposes on the State Banks a tax on their capital it cannot lay a tax on the shares of banks organized under the Act of June 3, 1864, providing a national currency." *Van Allen* vs. *Assessors*, 3 Wall. 573 affirmed.

This holding goes to the extent of declaring that the State cannot lay a tax upon any of the shares of the National Bank, where it only imposes a tax on the capital of the State Bank. A tax on the net capital and a tax on shares, being non-equivalents, the condition of the Act of Congress upon compliance with which the power to tax is granted, is not brought into operation: Consequently no power to tax exists. This case is particularly in point, as it is conceded that unincorporated banks of the State are only taxed on their net capital while the Statute of Ohio expressly requires shares of National Banks to be taxed at their true value in money.

In *State ex rel.* vs. *Jones, Auditor, supra,* the Court held that "Private banks were a class by themselves, subjected to a special mode of taxation." If incorporated State Banks were taxed on their capital and not on their shares, there would be no doubt that within the holding of *Bradley* vs. *The People,* National Bank shares could not be taxed, although the capital of such State Banks might be very small in comparison with the capital of National Banks, and much less than the capital of private banks. This was so held in the recent case of *McHenry* vs. *Downer,* 116 Cal. 20; notwithstanding the Statute required the corporate assets and property to be taxed at their full value. The factthat one class is incorporated and the other not, cannot avoid the objection of discrimination. The Act of Congress applies to all moneyed

capital in the hands of individual citizens of the State in any wise brought into competition with National Bank capital, and when it appears that bank capital of either of the two classes of State Banks, is the only property of the bank that is taxed, National Bank shares cannot be taxed within the construction of the Act of Congress settled in *Bradley* vs. *The People,* and followed in *McHenry* vs. *Downer.* What difference can it possibly make with the rights of the shareholders secured to them by the Act of Congress whether the individuals furnishing the bank capital are incorporated or not. The competition is the same with National Banks whether the banking be done by an artificial person, called a corporation, or by the individuals owning the capital who act directly for themselves. Nor does it seem to us that it makes any difference that at a particular period of time an equal amount of money may not be employed in private banking.

Private banks, under the Statute constitute a class with power to increase both in number and capital to any extent, and at present they constitute the largest banking class in the State. Where banking is classified by the Statutes the taxation as authorized must not result in material discrimination, and such discrimination necessarily results when material elements of value are excluded from the assessment of one class that are included in the other.

In *Bradley* vs. *The People,* the Court, in answer to the claim that a tax on the capital was *equivalent to* a tax on the shares as respects the shareholders, said, that that was the position taken by counsel in the case of *Van Allen* vs. *The Assessors,* 3 Wall. 584, and then added:

"Admitting it to be so, yet, inasmuch as the capital of the State Banks *may consist* of the bonds of the United States which were exempt from such taxation, it was not easy to see that the tax on the capital was equivalent to a tax on the shares."

This principle applies to private banks with equal force to that of incorporated banks. The very fact that the capital returned for taxation by private banks is less than the value of the shares of State incorporated banks may largely result from the fact that a large portion of the private banks' funds may be invested in Government bonds. It is sufficient, however, within this authority that the capital of the State Banks *"may consist* of the bonds of the United States."

This was the point of the decision in *Bradley* vs. *The People,* and *Van Allen* vs. *Assessors.* There is another reason equally as valid and persuasive, resulting from the difference between net capital value and share value. Three things enter into the value of shares in all corporate bodies organized for profit; capital, surplus and franchise. The capital, surplus, and good-will of the business make up the value of the shares. This was recently so held in *Adams Express Co.* vs. *Ohio,* 166 U. S. 185.

At page 220, Mr. Justice Brewer, speaking for the Court, of shares of stock, says:

"It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purpose of taxation."

And further on, page 222,

"The value which property bears in market, the amount for which its stock can be bought and sold, is the real value."

In *Everett's Appeal*, 71 Pa. St. 216, the current market value of shares of stock was held to be their value under a rule requiring property to be taxed at its true value.

In *Pullman Car Co.* vs. *Transportation Co.*, 171 U. S., page 154, Mr. Justice Peckham, speaking for the Court in a case involving the value of the property of a manufacturing corporation, said:

"The market price of the shares of stock * * * * includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross-defendant." (The liability being for the value of the corporate property). * * * "The value of the franchise for one thing enters into the computation of market value. * * * * The probable prospective capacity for earnings enter largely into market value and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself."

The judgment of the Court below in this case was reversed on the ground of the erroneous holding that the value of the shares was the value of the corporate property. The judgment finally given in that case representing the value of the corporate property was less than one-third the value of the shares.

In *People* vs. *Coleman*, 126 N. Y. 433, the Court in defining capital stock under the Statute relating to general taxation, say:

"The capital stock of a company is one thing; that of the shareholder is another and a different thing. That of the company is simply its capital existing in money or property or both, while that of the shareholder is representative not merely of that existing and tangible capital, but also of surplus, *of dividend-earning power of franchise* and of the *good-will* of an established and prosperous business."

Considering, in the light of these authorities, the different variant rules prescribed by the Statute for the taxation of investments in private banks and National Banks, resulting in taxing the former on net capital only, while the valuation of National Bank shares is based on the capital and franchise of the bank—the one not being the equivalent

of the other as held in *Bradley* vs. *The People, supra*—we confidently claim that this difference alone establishes a clear violation of the restriction contained in the Act of Congress against invidious taxation of investments in National Bank shares, and a violation so fundamental in character as to prevent entirely the taxation of National Bank shares. The Act of Congress has the same meaning now that it had when the *Van Allen* and *Bradley* cases were decided. If the value of bank shares and the banks' net capital were not the equivalent of each other when these cases were decided they are not now. Lapse of time has not changed the meaning of the Statute, nor rendered the restriction upon the taxation of National Bank shares less binding on the State than when the Statute was enacted.

Again, we understand opposite counsel to claim that inasmuch as the Judge delivering the opinion for the Supreme Court of Ohio, said that the special finding of facts did not show that the legal *bona fide* debts mentioned in the finding were of the class that are authorized to be taken from credits, such declaration is conclusive of this point and that therefore this Court cannot reach the main question involved in the case. There are several decisive answers to this claim. First, the Supreme Court of Ohio itself in the very outset of its opinion say, that the two questions involved, this being one of them, "are federal questions, and can only be finally and authoritatively determined by the Supreme Court of the United States." The interpretation of the finding in connection with the Statutes authorizing deduction considered in the light of the restriction contained in the Act of Congress as respects the shareholders on whose behalf relief is sought, is as much a federal question as the interpretation to be given to the Statute.

Reduced to a simple statement the claim of the Attorney General is, if the Supreme Court of Ohio, construe or interpret the finding of fact contrary to its obvious meaning, the meaning that all parties to the case as well as the Trial Court supposed it to bear, and on which the Trial Court gave judgment, that this Court is to accept that meaning as final. As well might it be claimed that because the Supreme Court of Ohio held, that $111,000,000 of credits was a small and insignificant sum compared with $54,000,000 of other moneyed capital, this Court is to accept that holding as true. If this doctrine is to prevail, rights secured by an Act of Congress would be held by a very brittle thread.

Moreover, the finding follows the language of the petition explicitly, and no objection was taken to its sufficiency of averment. The plaintiff alleged that on the day

"Next preceding the second Monday of April, A. D. 1893, and at the time the cashier of said banking association made return to the Auditor of said county of the names and residences of the shareholders of said association with the numbers and the par value of the shares

of the capital of said banking association for the year 1893, to wit, between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits from which, under the laws of Ohio he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them."

This allegation was met by a specific denial and treated throughout the trial as fully meeting the requirements of the Statute if sustained by proof. Having been sustained by proof the finding recited the allegation of the petition. The interpretation given to the finding by the Judge delivering the opinion of the Supreme Court was made without calling the attention of counsel to the point or affording an opportunity to have the finding enlarged by the Trial Court if held to be insufficient to raise the question supposed to be raised by it in the language employed.

Moreover, that the Supreme Court of Ohio did not carry any such interpretation of the finding into the judgment is shown by the syllabus. The question decided by the Court as stated in the syllabus is as follows: "In the administration of our tax laws the holder of National Bank shares has no right under the Statutes, State and National, to deduct his legal *bona fide* debts from the value of such shares, but he is legally bound to pay tax upon the assessed value of such shares without deduction on account of such debts." The only question decided was that under the laws, both State and Natoinal, the owner of shares in a National Bank has no right to deduct his legal *bona fide* debts from their value. That the point stated in the syllabus is the only one decided by the Court is rendered very explicit when rule 6 of that Court is considered. That rule provides that,

"A syllabus of the point decided by the Court in each cause shall be stated in writing by the Judge assigned to deliver the opinion of the Court, which shall be confined *to the points of law arising from the facts* of the cause that have been determined by the Court. And the syllabus shall be submitted to the Judges concurring therein for revisal before publication thereof, and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein. 55 O. S. ix."

This rule has been in existence for forty years, and it is perfectly understood by the profession, and all Courts in Ohio, that the law of any case decided by the Supreme Court of Ohio is found in the syllabus and not in the opinion. Undoubtedly, this Court, as held in *Machine Co.* vs. *Skinner*, 139 U. S. 293 ,in determining the ground upon which a judgment in a State Court was rendered will refer to the opinion of

the State Court, but regard must be had to the rule that the Court does not hold itself committed to what is said in the opinion, especially as respects a question not referred to in the syllabus, which contains the law of the case as expounded by the Court. It is a noticeable fact that both the Court and Attorney General use the term "legal bona fide debts" with the same meaning that the Court of Common Pleas, the State Circuit Court and counsel for the Bank and Treasurer all attached to it in the special finding. In the syllabus of the case made up as above stated the term is used precisely as used in the special finding and in the brief of the Attorney General; at page 15 he distinctly says in speaking of obligations for religious purposes, and the like, that for the purpose of making up credits they cannot be classed *as such debts;* so says the Statute; and the Trial Court and counsel in drafting the finding acted on the assumption that such was its meaning.

In discussing at page 30 of their brief the question of discrimination counsel say,

"There can be no discrimination between National Bank shares and credits as defined in the Ohio Statute, unless this Court arrives at the conclusion that moneyed capital as provided in Revised Statutes, Section 5219 U. S., is one and the same thing, or in the same class with "credits," *as defined* in the Ohio Statute, that is, unless it be determined that credits in the Ohio Statute is "moneyed capital." We do not concede that these two species of property are in the same class, but are of the opinion that the argument made at a former place as to the classification is conclusive of this case. * * * * There can be no comparison for the purpose of determining whether there is any discrimination with any other class of species of property under the Ohio Statute, other than what may be properly classed as moneyed capital, which is only *investments in stocks,* or *moneys* invested in the capital, or stock of any association, corporation, joint stock company or other company."

And in the concluding passage of the brief of the Attorney General he states that capital invested in National Bank stock is treated exactly "as capital invested in other 'stocks,'" and consequently the Act of Congress is not violated. The Court took the view that because they were stocks, and treated, as alleged, as other stocks by the Ohio Statute they were not discriminated against. At page 31 the Court say,

"If treated as stocks, as they are, under Court classification, there is no discrimination against them as compared with other stocks and bonds *and the great bulk of our taxable property.*"

It certainly is not difficult, from repeated adjudications of this Court, to establish the fact that taxing National Bank shares as other stocks may be taxed does not meet the condition of the Act of Congress prerequisite to their taxation.

It, however, is not necessary to discuss that question at length, for, not a share of stock in a domestic corporation in Ohio outside of bank shares, and shares of Building and Loan Associations taxed as credits, is taxed in Ohio. In all cases other than these two classes the only tax laid or received is on and from the corporate property taxed to and paid by the corporation, and in which cases, not the slightest account is taken of franchise, good-will, dividend-earning power, or the like. Hence, it is not true that National Bank shares are taxed as other investments in stocks are taxed. They are taxed in entire disregard of the mode of taxation of other corporate property, and at a value augmented over that of other corporate property by an amount equal to the value of the franchise. Aside, however, from this, that moneys invested in credits is "moneyed capital" as that term is used in Section 5219 of the Revised Statutes, has been held in many cases; notably, *Britton* vs. *Bank; Stanley* vs. *Supervisors,* 101 U. S.; *Mercantile Bank* vs. *New York,* 121 U. S., and *Whitbeck, Treasurer,* vs. *Mercantile National Bank,* 127 U. S.

In *Mercantile National Bank* vs. *New York,* 121 U. S. 128, the Court in speaking of the Act of Congress and the meaning of the term "moneyed capital" as used there, said that it included,

"Shares of stock, or *other interests,* owned by individuals in all enterprises in which the capital employed in carrying on its business is money where the object of the business is the making of profits by its use as money."

And in the latter case of *Palmer* vs. *McMahon,* 135 U. S. 667, it was said, speaking of the same term,

"It embraces capital employed in National Banks and capital employed by individuals when the object of their business is the making of profits by the use of their moneyed capital as money."

In *Stanley* vs. *Bank, supra,* the Court did not stop to enquire whether the credits and moneyed obligations in the State of New York, aside from bank capital, were moneyed capital as that term is used in the Act of Congress, but assumed that a sufficient amount of moneyed obligations, not investments in stocks, was exempt from taxation by the New York Statute to cause by such exemption from taxation a conflict with the act of Congress. In Ohio credits embrace the entire moneyed capital of the State outside of bank capital, and capital in building and loan associations and investments in two general classes of bonds, not constituting one-twelfth part of the amount invested in credits actually taxed, and undoubtedly not one-twentieth part of the entire credits of the State, embracing those taxed and those exempt by reasons of deductions actually made therefrom.

Furthermore, the Supreme Court of Ohio treated credits as moneyed capital.

At page 27 of the Record, speaking of the law laid down by this court in the syllabus in *Whitbeck, Treasurer, vs. The Mercantile National Bank,* the Court say: "That holding was right if the Statute of Ohio were as recited, but as clearly shown the Statutes of Ohio do not allow a deduction equal to the *bona fide* debts to be made from the amount of the assessments of the value of moneyed capital in general, but only from a small and comparatively insignificant amount *of moneyed capital, called credits;*"

Deducing the fact that the amount was insignificant by comparing credits, $111,173,728 in amount, not with other moneyed capital, such as investments in bonds, stocks, annuities or otherwise, amounting to only $9,676,374, but with all other taxable property of the State of every kind, amounting to $1,641,817,202. As bearing upon the point, we mention the fact that under the Ohio Statute, Section 3181, all obligations, claims and demands of every kind, expressed or implied, however evidenced, whether in the form of a direct promise, or book account, draw interest from the time they become due. And that by Section 2734, all money loaned no pledge, or mortgage of real estate is a credit. In *Myers* vs. *Seaberger,* 45 O. S. 232, the Court say,

"A loan of money secured by mortgage on real estate is a credit within the meaning of the Statutes of this State providing for the taxation of property."

We mention this fact to make clear, in addition to the point under discussion, the distinction between loans of money secured by mortgage in Ohio and in Kansas.

To remove all doubt that National Bank shares, taxed under Section 2762 of the Revised Statutes at their actual value in money, are not taxed as other stocks are taxed, we direct attention to he Statute making provision for the taxation of other stocks in the State.

Section 2744 of the Revised Statutes of Ohio provides "that the president, secretary and principal accounting officer of every canal or slack water navigation company, turn pike company, plank road company, telegraph company, *or joint stock company,* except banking or other corporations whose taxation is specially provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, shall list for taxation, verified by oath of the person so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money."

The corporations whose taxation is specially provided for and consequently withdrawn from the above rule, are railroad, telegraph, telephone and express companies, which are taxed, not on their shares,

but on a ratable division and distribution to the various counties in which they operate or do business, of the portion of their property located in the State. *State ex rel. vs. Jones, Auditor,* 51 O. S. 501. They therefore constitute no exception to the rule for taxing corporate property.

Section 2746 provides:

"Personal property of every description, moneys and credits, investments in bonds, stocks and joint stock companies or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, *but no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of such company.*"

"Capital stock," as here used, was held in *Jones* vs. *Davis,* 35 O. S. 474, to mean the property of the corporation. It will thus be seen from these two sections that the great body of corporations of the State are taxed only on their corporate property, while bank shares are taxed at their true value in money, and shares of building and loan associations as credits.

Having shown that under the Statutes of Ohio the great bulk of investments in corporate stocks are not taxed at all except through the partial equivalent of taxing the corporate property, and that the great bulk of other moneyed investments are taxed only on the difference between their value and the debts of the owner, and that private banks are taxed only on net capital, while National Bank shares are taxed at their actual value in money, we respectfully submit the taxing of the latter to be wholly unauthorized and void. If wrong in this claim, we confidently claim that the tax is void to the extent that it embodies in its assessment for taxation an amount equal to the legal *bona fide* indebtedness of the owners of National Bank shares; that *Whitbeck, Treasurer,* vs. *The Mercantile National Bank* was not only well considered and correctly decided, but rests on the firmest foundation, and that its judgment is of controlling authority in the premises.

Respectfully submitted,

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